JD–50–19
Dallas, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES (IATSE), LOCAL 127 (THE TEXAS BALLET THEATRE)

and **CASES 16–CB–219221**
16–CB–226852

MARTIN AUDETTE, an Individual

Becky Mata, Esq., for the General Counsel.
Hal K. Gillespie, Esq. (Gillespie Sanford, LLP), of Dallas, Texas, for the Respondent.
Martin Audette, for the Charging Party.

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge. A union member complained to the Respondent about the actions of others in the Union. The General Counsel contends that the Respondent breached its duty of fair representation by failing to inform the member what it had done to address the matters he had raised. However, the complaint must be dismissed because (1) the evidence does not establish that the Board has jurisdiction; (2) the Act does not impose a duty of fair representation because the member's complaints concerned strictly internal union matters and did not call upon the Respondent to act in its capacity as exclusive bargaining representative; and (3) the credited evidence does not prove the facts alleged in the complaint.

Procedural History

This case began on April 27, 2018, when the Charging Party, Martin Audette, filed the initial charge against the Respondent, International Alliance of Theatrical Stage Employees, Local 127, with the Board's Regional Office in Fort Worth, Texas. The Board docketed this charge as Case 16–CB–219221. The Respondent received a copy of this charge on April 30, 2018.

The Charging Party amended this charge on May 10, 2018 and served a copy on the Respondent on the same date. The Charging Party again amended the charge on October 5, 2018, and the Respondent received a copy of this second amended charge on October 9, 2018.

On September 9, 2018, the Charging Party filed another charge, docketed as Case 16-CB-226852, and served it on the Respondent on the same date.

On October 31, 2018, the Regional Director for Region 16 of the Board, acting pursuant to authority delegated by the Board's General Counsel and on the General Counsel's behalf, issued an Order consolidating cases, consolidated complaint and notice of hearing. The Respondent filed a timely answer.

On March 11, 2019, a hearing opened before me in Fort Worth, Texas. At that time, the General Counsel amended the consolidated complaint (which, for brevity, will be referred to below as the complaint). The Respondent filed a timely amended answer.

On March 11 and 12, 2019, the parties presented evidence. On March 12, after the parties had rested, I adjourned the hearing until April 22, 2019, when it resumed by telephone conference call for the presentation of oral argument. The hearing then closed.

Admitted Allegations

The Respondent's answer to the complaint admitted that allegations raised in complaint paragraphs 1(a), (b), (c), 2, 3(a), 4, 5, and 6. Based on those admissions, I find that the General Counsel has proven these allegations.

More specifically, I find that the unfair labor practice charge and amended charges were filed and served as alleged in complaint paragraphs 1(a), (b), (c), and 2.

Additionally, I find that at all material times, the Employer, the Texas Ballet Theatre, has been a corporation with an office and place of business in Dallas, Texas, and has been engaged in producing ballet performances, as alleged in complaint paragraph 3(a).

Further, I find that at all material times, the Respondent has been a labor organization within the meaning of Section 2(5) of the Act, as alleged in complaint paragraph 4. Additionally, I find that at all material times the Respondent and the Employer have maintained an agreement and practice requiring that Respondent be the exclusive source of referrals of employees for employment with the Employer, as alleged in complaint paragraph 4(a).

Moreover, I find that at all material times since about September 1, 2014, the Respondent has been, and has been recognized by the Employer as being, the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the employees in the bargaining unit described in the recognition clause of a collective-bargaining agreement entered into by the Employer and the Respondent. This agreement is effective by its terms from September 1, 2017 until August 21, 2022. Further, I find that the bargaining unit described in this agreement constitutes an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

Additionally, I find that at all relevant times, Charging Party Audette has been a member of the Respondent and has worked for employers in units where the Respondent has been the

exclusive bargaining representative. The complaint further alleges, and the Respondent admits, that at all relevant times the Respondent owed Charging Party Audette the duty of fair representation. This duty arises because of the Respondent's status and authority as the exclusive bargaining representative of the employees in the bargaining unit.

Also, I find that, as alleged in complaint paragraph 5, the following individuals are agents of the Respondent within the meaning of Section 2(13) of the Act: Business Agent Gregg Pearlman, Union President Johnny Macho, Executive Board Member Shombrae Winston and Job Steward Anthony Woodard.

Jurisdiction

The complaint in this case alleges that the Respondent violated Section 8(b)(1)(A) of the Act by restraining and coercing *employees* in the exercise of rights guaranteed in Section 8(a)(1)(A) of the Act. To prove a violation, the General "Counsel must establish, among other things, that a union's alleged action affected an employee. Even if a union restrained or coerced someone, if that individual is not an "employee" within the meaning of the Act, then there is no violation.

To establish that a person is an employee, the General Counsel must prove that the individual has an employment relationship[1] with an entity which meets the Act's definition of "employer." If the person works for an entity which lies outside the Act's definition of "employer" - for example, a railroad subject to the jurisdiction of the Railway Labor Act, or a Governmental body - then the individual is not an "employee" as the Act defines that term.

The Government thus must do more than prove that a union restrained or coerced someone who worked somewhere. The complaint must identify a putative employer and allege that it is an employer within the meaning of Section 2(2) of the Act. Then, the General Counsel must prove those allegations.

Additionally, the Government must establish that the employer not only meets the statutory definition set forth in Section 2(2), but that it also satisfies the Board's discretionary standards for the exercise of its jurisdiction. These standards concern the extent to which an employer is engaged in interstate commerce. The General Counsel bears the burden of proving these allegations.

The various subparagraphs of paragraph 3 of the present complaint address these requirements. Paragraph 3(a) identifies a putative employer, the Texas Ballet Theatre. As noted above, the Respondent has admitted and I have found that the Texas Ballet Theatre is a corporation with an office and place of business in Dallas, Texas.

[1] Here, I use the phrase "has an employment relationship with" rather than "works for" because, for certain purposes, the Act treats job applicants as employees. Additionally, Sec. 2(3)'s definition of "employee" also includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . ." 29 U.S.C. § 152(3).

However, for the reasons discussed above, that alone does not suffice for the assertion of the Board's jurisdiction. Complaint paragraph 3(d) alleges that at all material times the Texas Ballet Theatre is an employer engaged in commerce within the meaning of Section 2(2) of the Act. The Respondent has denied this allegation. Similarly, the Respondent has not admitted the allegations in complaint paragraphs 3(b) and (c) which, if proven, would establish that the Texas Ballet Theatre engages in commerce to an extent sufficient to satisfy the Board's discretionary standards.

After reviewing the record, I conclude that the General Counsel has not proven, by a preponderance of the evidence, either that the Texas Ballet Theatre is an employer within the meaning of Section 2(2), (6), and (7) of the Act or that it is engaged in commerce sufficiently to satisfy the Board's discretionary standards. The complaint does not allege that any entity other than the Texas Ballet Theatre is an employer engaged in commerce.

Therefore, I recommend that the Board dismiss the complaint because jurisdiction has not been established.[2]

However, it is possible that the Board will disagree with this conclusion. Therefore, I will address the merits and discuss how I would decide the issues should the Board conclude that the record sufficiently establishes jurisdiction.

Credibility of Witnesses

The testimony of various witnesses varied sufficiently that I must assess their credibility. For the following reasons, I conclude that the Charging Party, Martin Audette, should not be credited when his testimony conflicts with the accounts of other witnesses.

[2] In reaching this conclusion, I have considered whether the Respondent's status, as the representative of employees who work for an employer within the meaning of Sec. 2(2) of the Act, might be inferred from some of the admissions in the Respondent's answer. For example, the Respondent admits that it is a labor organization within the meaning of Sec. 2(5) of the Act. That provision defines "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, *in which employees participate* and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (emphasis added). Sec. 2(3) excludes from the definition of "employee" any individual employed "by any other person who is not an employer as herein defined." 29 U.S.C. § 152(3). It might be argued that Respondent, by admitting that it is a labor organization within the meaning of Sec. 2(5), thereby admitting that some "employees" participate in it, thereby further admitting that some individuals who participate in the Respondent are employed by entities that are "employers" within the meaning of Sec. 2(2) of the Act. 29 U.S.C. § 152(2).

However, this logic is too tenuous to be very satisfying and it falls short of establishing that the Respondent is the exclusive bargaining representative of employees who work for an "employer" within the meaning of Sec. 2(2) of the Act. Moreover, this reasoning does not prove that the Respondent has a collective-bargaining relationship with an employer which meets the Board's discretionary standards for assertion of jurisdiction.

Some of Audette's testimony itself calls into question his acuteness as an observer of the reality around him. For example, he gave the following testimony concerning a visit he paid to a fellow union member who was in the hospital after a motorcycle accident:

> Q. And what did you do when you were in the hospital room?
> A. I was talking to my—I was telling him he looked better than I had been told. I told him that we were saying prayers for him, and at one point, I took a picture of him.
>
> Q. Why did you take a picture of him?
> A. Well, he took a picture of me when I was at my worst condition, and I thought—he showed it to me, and I thought that maybe whenever he gets out of this, if he should survive, that he would appreciate the fact that I had tooken (sic) a picture of him when he was at his worst.
>
> Q. Okay. Were you aware that Steele was in a coma?
> A. At that time, I was not aware that he was in a coma.

Audette's answer to the first question above conveys the impression of an ordinary conversation that a visitor might have someone convalescing. Thus, telling a patient that "he looked better than I had been told" suggests nothing unusual. Audette doesn't mention, until specifically asked, that he was talking to someone who was unconscious at the time.

On cross-examination, the Respondent's counsel read to Audette a portion of the witness's pretrial affidavit describing this same visit to Steele's hospital room. The quoted portion did not mention Audette talking to the unconscious patient. The cross-examiner asked Audette if it was still his testimony that he was talking to Steele. Audette answered:

> If I go to a funeral and I talk to a dead body, I am talking to a dead body, okay? It doesn't mean I am not talking. I talked to him, yes. It doesn't matter which state he was in. I was talking to him. He was not talking to me.

Audette's testimony about talking to the comatose patient does not reflect adversely on his credibility. However, a further portion of his testimony about this hospital visit does raise some concern about his candor.

Audette not only took a picture of the unconscious fellow union member but posted the photograph online. The record suggests that some other union members considered Audette's publication of the picture improper, and harbored hostility against him.

Audette's testimony about his reason for posting the photograph raises the possibility that he had been seeking revenge. He explained that the patient had taken "a picture of me when I was at my worst condition, and I thought. . .that maybe whenever he gets out of this, if he should survive, that he would appreciate the fact that I had tooken (sic) a picture of him when he was at his worst."

If Audette simply had said, "I was getting even because he had taken an unflattering picture of me," such candor would have increased my confidence in the reliability of his testimony. Instead, he said he thought that Steele, "whenever he got out of this," would "appreciate" the fact Audette had photographed him "at his worst."

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Audette's use of the ambiguous word "appreciate" "—which can mean either be grateful for" or "understand the significance of" -suggests a clever choice of language which obscures vindictive motivation. Some of Audette's out-of-court statements, discussed below, indicate that he also could spin language to exaggerate the seriousness of other people's actions.

Audette not only depicted himself in a better light, he also chose words to cast less favorable light on others. One example concerns events relevant to complaint paragraph 8(a), which alleges that about March 20, 2018, Audette filed a complaint with the Respondent regarding an employee's threat against him. On this date, Audette was working at the Winspear Opera House in Dallas when another stage hand, angry about Audette's photographing the comatose fellow union member, said "something to the effect that he thought he should whip my a-s-s, yeah, that kind of terminology." The General Counsel then pressed Audette for a more precise quote:

> Q. BY MS. MATA: So, what were—what was Charles Chaz Phillips exact words that he used?
> A. Whip my ass, Kick my ass, along those lines. I don't recall—yeah, it was a threat of, you know, his 6-foot-4, 300 pounds, half my age going to whip my ass. Yeah, that was the gist of it.
>
> Q. And you thought that was a credible threat?
> A. Yes.

Audette sent a text message about this incident to the Respondent's business agent, Greg Pearlman. However, Audette did not simply say that another stagehand had threatened to "kick my ass" or "whip my ass." Rather, Audette's text message claimed that the other stagehand had "made a terroristic threat to me . . . in front of numerous witnesses including the client (a misdemeanor crime)."

Typically, voicing an intent to "kick [someone's] ass" without more, amounts to garden-variety hyperbole. Even assuming that surrounding circumstances made it reasonable to believe that the speaker was planning to inflict actual gluteal injury, and even assuming that the words therefore constituted a "misdemeanor crime," it would still be a wild exaggeration to call such a statement a "terroristic threat."

Notwithstanding Audette's description of the speaker's height and weight, his testimony hardly suggests that the "kick your ass" comment actually caused him to fear for his safety. Audette didn't claim that this speaker made any menacing gesture or move which would suggest imminent action. Audette also did not attribute to the speaker any words expressing an intent to take action against him at some future date.

Indeed, Audette didn't even claim that the speaker said that he *would* kick his ass. Audette quoted him merely as saying "he thought he *should* whip my a-s-s . . ." (Italics added.) Such words express strong displeasure but they do not rise to the level of a true threat, let alone a "terroristic threat."

Audette's text message to the business agent, claiming that someone "made a terroristic threat to me" exaggerates and mischaracterizes what actually was said. Neither Audette's testimony about the incident nor any other evidence suggests that he had any basis for imputing a *terrorist* motive to the other stagehand. At best, Audette's text message displayed a reckless disregard for truth.

Even apart from the wild exaggeration, Audette's text message raises questions about the reliability of his testimony. Audette's original message, sent to Business Agent Pearlman on March 20, 2018 at about 5:30 p.m., stated, in part:

> Just to let you know, *Seth* made a terroristic threat to me at the Winspear today in front of numerous witnesses including the client (a misdemeanor crime). . . [Italics added.]

However, Audette got the name wrong. It wasn't "Seth." Audette sent another text which stated:

> Or maybe his name is Chris, think he used to work at the Myerson.

That too, was inaccurate. An hour and 45 minutes later, Audette sent Pearlman a text which identified the speaker as "Chas Freeman."

This time, Audette appears to have made some progress. The individual's last name wasn't "Freeman" but his first name was "Charles" or "Chas." During the hearing, Audette testified that the person's last name was "Phillips." On April 7, 2018, Audette sent Business Agent Pearlman this text message:

> I consider that it is a offence that Chas Phillips is a member of our Union, and I will pursue all options to remove him from the work referral roster, including contacting IATSE[.]

Audette's repeated incorrect identifications of the person who made the "kick your ass" statement does not increase my confidence in the reliability of his testimony.

Additionally, the long halflife of Audette's desire to get even for the "kick your ass" remark is significant. According to Audette, Phillips told him on March 20, 2018 that he, Phillips, should kick Audette's ass. The record does not suggest that Phillips (who did not testify) said anything else or did anything else that would give Audette offense. However, Audette's April 7, 2018 text message indicates that he still was so upset that he would "pursue all options" to have Phillips' name referred from the referral list, which would deal a quite serious blow to Phillips' ability to make a living.

Audette displayed a tendency to overreact. As discussed above, on March 20, 2018, he sent text messages to Business Agent Pearlman concerning what Audette called a "terroristic threat." The next day, he went to the Pearlman's office and discovered that Pearlman was on the telephone. Rather than waiting until Pearlman finished the call, Audette interrupted him. Audette testified:

> I went to the Union Hall and I went to his office. He was on the phone. I said something about, Did you get my text messages, and he told me he was on—he told me that he was talking on the phone. So, I mentioned something about I was fixing to file a police report on this, and he—his response was, Do whatever you want to do, and was somewhat angry when he said that.

Thus, even after seeing that Pearlman was talking on the phone, Audette was unwilling to wait until the call was over. Instead, he interrupted again to tell Pearlman of his intent to file a police report.

Perhaps Audette did not realize how his own impatience had taken control of him, but in any event, he did something dramatic after seeing that Pearlman was not going to hang up the phone. Audette testified:

> [A]fter [Pearlman] told me that I could do whatever I wanted to do, I proceeded towards the front door, the inside front door of office, and I called 9-1-1, so that I could report the incident. . .

A police officer arrived and Audette told him about the other stagehand's "kick your ass" comment. Audette testified that after he made this report, he went home without talking with Pearlman.

On this occasion especially, Audette acted with self-dramatizing flair, and the word "acted" seems fitting in a theatrical as well as legal sense. However, "theatrical" and "credible" are not necessarily synonyms.

Audette's inclination to dramatize and exaggerate, his tenacious partisanship, his repeated errors in identifying who made the "kick your ass" statement, and his seeming disregard for objective truth all lead me to conclude that his testimony is not reliable for any purpose. Additionally, my observations of witness demeanor do not contradict my conclusion that witnesses other than Audette more dependably recounted the facts.[3] Therefore, I credit Audette's testimony only when it is consistent with that of other witnesses.

Duty of Fair Representation

The complaint raises four allegations that the Respondent restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and thereby violated Section

[3] Based on my observations while they testified, I have particular confidence in the testimony of the Respondent's president, John Macho, and of Shombrae Winston, a member of the Respondent's executive board. I conclude that their testimony is reliable and credit it.

8(b)(1)(A) of the Act. The General Counsel characterizes three of the alleged violations as breaches of the duty of fair representation. These allegations appear in complaint paragraphs 7, 8, and 10.

As described below, each of these 3 complaint paragraphs alleges that the Respondent failed to take a particular action. In contrast, complaint paragraph 9 alleges that the Respondent's president made a statement to an employee which the General Counsel argues is unlawful because it constitutes a threat.

Complaint paragraph 11 alleges that the "conduct" alleged in these four paragraphs violated Section 8(b)(1)(A) of the Act. However, it should be noted that the "conduct" described in complaint paragraphs 7, 8, and 10 consists of alleged failures to do something. These alleged breaches of the duty of fair representation might be called unfair labor practices of omission rather than commission.[4]

Establishing an alleged violation when the "conduct" consists of a failure to act requires the General Counsel to prove more. In such cases the Government's burden of proof obviously includes the additional element of establishing that the respondent had a *duty* to do what it allegedly left undone. Just as a person cannot be guilty of failing to pay taxes if he had no duty to pay the tax in the first place, a union does not commit an unfair labor practice by failing to do something the law does not require.[5]

Here, the General Counsel argues that the Respondent did have a duty to act. In complaint paragraphs 7(a) and 8(a), the Government alleges that Charging Party Audette made written complaints to the Respondent, and in complaint paragraphs 7(b) and 8(b), the Government alleges that the Respondent failed to inform Audette what "remedial efforts" it had made in response to these complaints. Although the complaint does not specifically allege that the Respondent had a duty to inform Audette about its "remedial efforts," the General Counsel made this theory of violation clear during oral argument.

With respect to complaint paragraph 9, during oral argument the General Counsel also made clear the Government's position that the Respondent had a duty to inform Audette about, in the words of the complaint, a "procedure by which he could submit complaints regarding workplace conflicts with other employees." As noted above, the General Counsel bears the burden of proving that such a duty exists.

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[4] Not all breaches of the duty of fair representation result from a union's failure to act. For example, a union can breach this duty by enforcing a collective-bargaining agreement in a discriminatory manner which favors union members over nonmembers. See *Letter Carriers Branch 3126 (Postal Service*, 330 NLRB 587 (2000); *Auto Workers (Ford Motor Co.)*, 325 NLRB 530 (1998). A union also can violate Sec. on 8(b)(1)(A) of the Act in a manner which, although unlawful, would not ordinarily be called a breach of the duty of fair representation. For example, a union unlawfully may threaten to take some action against an employee in retaliation for engaging in protected activity. See, e.g., *Electrical Workers IBEW Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995). In the present case, the violation alleged in complaint par. 9 falls into this latter category.

[5] The complaint does not specifically plead that the Respondent was under a duty to take some action, but that does not relieve the Government of the obligation to prove the existence of such a duty.

However, for reasons discussed below, I conclude that the Act does not place on the Respondent a duty to take the actions which the General Counsel asserts it should have taken, because such actions do not pertain to the duties which the Act requires the Respondent to perform in its capacity as the employees' exclusive bargaining representative. The history of the duty of fair representation as a judicial doctrine, and particularly the Supreme Court opinions recognizing and interpreting it, clearly show that the duty pertains to a union'' *dealings with an employer* in the union's representative capacity.

The first Supreme Court decision recognizing such a duty concerned railway employees and the Railway Labor Act, 48 Stat. 1185, 45 U.S.C. 151 et seq., which applies to workers in railroad and airline industries. In *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944), a union representing railroad firemen engaged in racial discrimination. It excluded from membership those employees who were not white; then it sought and obtained a collective-bargaining agreement which restricted their opportunities for employment and promotion. The Alabama Supreme Court found the union's action to be lawful but the United States Supreme Court reversed, stating:

> We hold that the language of the [Railway Labor Act], read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.

Steele v. Louisville & N.R. Co., 323 U.S. at 202-203. The National Labor Relations Act imposes a similar duty. In *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944), decided the same date as *Steele*, the Court stated: "By its selection as bargaining representative, [the union] has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially."

In *Humphrey v. Moore*, 375 U.S. 335, 342 (1964), the Supreme Court stated that the "undoubted broad authority of the union as exclusive bargaining agent in the *negotiation and administration of a collective bargaining contract* is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation." (Emphasis added.) See also *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967) ("It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation").

In *Breininger v. Sheet Metal Workers*, 493 U.S. 67, 86–87 (1989), the Supreme Court observed that the duty of fair representation "arises independently from the grant under 9(a) of the NLRA, 29 U.S.C. 159(a) (1982 ed.), of the union's exclusive power to represent all employees in a particular bargaining unit."

Supreme Court precedent thus establishes both that the duty of fair representation results from a union's statutory authority as the exclusive bargaining representative and that the duty applies to the union's conduct "in the negotiation and administration of a collective-bargaining agreement." However, the Supreme Court's decisions do not suggest that a union's duty of fair representation would apply to other matters not involving the wielding of the authority conferred by statute on the exclusive bargaining representative.

Although the doctrine thus originated in the courts, for more than 50 years the Board also has held that when the Act empowers a union to serve as the exclusive bargaining representative, along with that authority comes a responsibility to exercise it fairly. See, e.g., *Miranda Fuel Co.*, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d 1963). The Supreme Court has held that both the Board and the courts have jurisdiction to hear cases concerning the duty of fair representation, *Vaca V. Sipes*, 386 U.S. 171 (1967), but it should be noted that the Board's focus differs somewhat from that of the courts. The Board considers whether an alleged breach of the duty of fair representation constitutes an unfair labor practice in violation of Section 8(b)(1)(A), and sometimes also of Section 8(b)(2), of the Act.[6] However, Section 8(b)(1)(A) of the Act includes a proviso which limits the extent of the Board's authority:

> Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership. . .

29 U.S.C. § 158(b)(1)(A). Moreover, the Board has held that Section 8(b)(1)(A) does not proscribe wholly intraunion conduct and discipline. Instead, the Board has found that Section 8(b)(1)(A)'s proper scope in union discipline cases is to proscribe union conduct against union members that impacts on the employment relationship; impairs access to the Board's processes; pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts; or otherwise impairs policies imbedded in the Act. *Steelworkers Local 9292 (Allied Signal Technical Services)*, 336 NLRB 52, 54 (2001), citing *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000).

The Board possesses authority to assure that a union fairly represents all bargaining unit employees in dealings *with their employer* because the union's status and responsibility as exclusive bargaining representative - a status conferred pursuant to Section 9(a) of the Act - is an element, indeed a key element, in the statutory scheme which Congress created the Board to enforce. See 29 U.S.C. § 159(a). The Act empowers the Board to decide matters related to employees' rights to engage in or refrain from protected activity, including their right to choose a labor organization to represent them in dealing with their employer. The law also gives the Board authority to assure that employers and their employees' exclusive bargaining representatives bargain collectively and in good faith. That is the beat which Congress assigned the Board to walk, but there are other beats assigned to other federal agencies.

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[6] Sometimes, but not always, an unfair labor practice which restrains and coerces employees in the exercise of their Sec. 7 rights, thereby violating Sec. 8(b)(1)(A) of the Act, will also violate Sec. 8(b)(2) because it results in an employer discriminating against an employee in violation of Sec. 8(a)(3). For example, if a union operating an exclusive hiring hall fails to notify job applicants of a change in referral procedures, this breach of the duty of fair representation might also, depending on circumstances, result in an employer not hiring an applicant who otherwise would have gotten the job. Compare *Electrical Workers IBEW Local 675 (S & M Electric)*, 223 NLRB 1499 (1976) and *Plumbers Local 38 (Bechtel Corp.)*, 306 NLRB 511 (1992). The present complaint does not allege that the Respondent violated Sec. 8(b)(2) of the Act.

Congress did not give the Board authority to regulate the strictly internal relationship between a union and its members. Rather, it enacted separate legislation concerning the rights of union members vis-à-vis their union and assigned enforcement responsibilities to the Department of Labor, not to the Board. See the Labor-Management Reporting and Disclosure Act of 1959 (LMDRA), 29 U.S.C. §§ 401-531. The LMDRA also grants a right to sue in federal court to any person whose rights under that statute have been infringed. See 29 U.S.C. § 412.

Thus, the term "duty of fair representation" could be used generously to apply to obligations imposed on a union by statutes other than the National Labor Relations Act and therefore outside the Board's authority. However, this decision uses the phrase more narrowly, as a term of art referring only to a union's duty which the Board has power to enforce. To fall within the Board's authority to remedy, an alleged violation of the duty of fair representation must concern how a union wields its authority, granted by the National Labor Relations Act, in its capacity as the employees' exclusive bargaining representative.

Such an exclusive bargaining representative exercises this statutory authority, and discharges its statutory duties, in several ways. It engages in collective bargaining with the employer on behalf of the employees. It also uses its statutory authority when administering, on behalf of bargaining unit employees, the collective-bargaining agreement it negotiated with the employer, and when representing employees in grievance proceedings using procedures established by the contract. In performing these functions as exclusive bargaining representative, a status bestowed by the Act, a union has a duty of fair representation cognizable under the Act.[7]

A duty of fair representation also arises when a union operates an exclusive hiring hall. A union establishes such a job referral system, for the benefit of its members, by reaching agreement with one or more employers. Thus, a union operating such a hiring hall is dealing with employers on behalf of employees and not merely engaged in a strictly internal union matter. Such a union is exercising authority granted by the Act, which brings its conduct within the Board's purview. When operating an exclusive hiring hall, a union's duty of fair representation includes providing job applicants with information relevant to their use of this referral system.[8]

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[7] It may be stressed that, in serving the unit of employees it represents, a union, as the employees' bargaining representative, must be afforded a "wide range of reasonableness." See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). To be accorded this "wide range of reasonableness," a union must act "in good faith, with honesty of purpose, and free from reliance on impermissible considerations." *Auto Workers Local 651 (General Motors Corp.)*, 331 NLRB 479, 480 (2000), quoting *P.P.G. Industries*, 229 NLRB 713, 715 (1977), enf. denied 579 F.2d 1057 (7th Cir. 1978). See *Union de Obreros de Cemento Mezelado (Betteroads Asphalt Corp.)*, 336 NLRB 972 (2001). Here, the question being considered does not concern whether the Respondent acted within a wide range of reasonableness but the more fundamental issue of whether the Act required it to take any action at all.

[8] The Board has found that a union breached that duty when it failed to give job applicants timely notice of lawful modifications in its contractually-established hiring hall system. *Stage Employees IATSE Local 545 (Greater Miami Opera Assn.)*, 310 NLRB 763 (1993); *Stage Employees IATSE Local 720 (Tropicana Las Vegas, Inc.)*, 363 NLRB No. 148 (2016); *Plumbers Local 38 (Bechtel Corp.)*, above. A departure from established exclusive hiring hall rules also can breach the duty of fair representation. See *Operating Engineers Local 150*, 352 NLRB 360 (2008)

In the present case, the complaint alleges and the Respondent has admitted that it does operate an exclusive hiring hall. However, the complaint does not allege that the Respondent departed from established referral procedures or committed any unfair labor practice related to its operation of the hiring hall.

Nonetheless, it may be instructive to contrast the operation of a contractually-established hiring hall, an activity which is subject to the duty of fair representation, with the activities described in the present complaint. Unlike the establishment and operation of a hiring hall, these activities do not require the Respondent to deal with an employer on behalf of employees. Additionally, these activities do not arise because of any agreement between an employer and the Respondent. Therefore, they do not give rise to a duty of fair representation.

The present complaint does not allege that the Respondent failed to perform a duty related to collective bargaining or a duty related to representing an employee in a grievance proceeding. Rather, the General Counsel asserts that the Respondent had a duty to notify Audette about what "remedial efforts" the Respondent had taken concerning Audette's complaint that a union official had engaged in "unwanted horseplay."

This question naturally arises: If the alleged breach of the duty of fair representation had nothing to do with the Respondent's fulfilling its duty to represent employees at the bargaining table, and if the alleged breach had nothing to do with the Respondent's duty to represent employees in grievance proceedings, and if it did not concern the operation of the Respondent's hiring hall, then how did the Respondent's supposed inaction affect the performance of any function associated with its statutory duties as exclusive bargaining representative?

Stated another way, to prove that a union breached its duty of fair representation and thereby violated Section 8(b)(1)(A) of the Act, the Government must show that the union's action or inaction pertained to a representation function, which means some kind of dealing with the employees' employer. However, in the present case, the alleged violations involve internal union matters not directly related to the Respondent's service in a representative capacity.

For example, the General Counsel alleges that on two occasions, the Respondent breached its duty of fair representation by failing to notify Audette "regarding its remedial efforts" to address two written complaints which Audette had submitted. More specifically, complaint paragraph 7(a) alleges that about February 18, 2018, Audette complained to the Respondent about "unwanted horseplay by another union official" and complaint paragraph 7(b) alleges that Respondent failed to notify Audette "regarding its remedial efforts to resolve [Audette's] complaint." Complaint paragraph 8(a) makes similar allegations, which will be discussed further below. Paragraph 11(a) of the complaint, as amended, alleges that

> By the conduct described in paragraphs 7 and 8, Respondent has failed to inform Charging Party Audette about its efforts on his behalf for reasons that are arbitrary, discriminatory, or in bad faith and has breached the fiduciary duty it owes to said employee and the Unit and it has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act.

The complaint, as amended, thus assumes that the Respondent has a fiduciary duty to inform bargaining unit employees about remedial efforts it had taken in response to their complaints. But does such a duty arise regardless of the nature of the complaint? If a member complained about something totally unrelated to representation—for example, a broken air conditioner at the union hall—would the Act require the union to inform members on what it was doing to fix the problem? Would the union breach its duty of fair representation if it failed to answer a member's request for such information?

In the present case, it is hardly self-evident that the Respondent has a duty, *cognizable by the Board*, to curtail horseplay or to police what one employee says to another. The Government bears the burden of proving the existence of such a duty by showing its relationship to the Respondent's functioning as the employees' exclusive bargaining representative. Thus, to establish a breach of the duty of fair representation and consequent violation of Section 8(b)(1)(A), the General Counsel must prove that the Respondent's alleged failure to act was in the course of negotiating or administering a collective-bargaining agreement or concerned an obligation created by such a contract, or that the alleged failure to act pertained to its operation of a hiring hall, or that the alleged failure to act had some other demonstrable connection to dealing with an employer on behalf of employees.

The credited evidence does not establish that Audette requested the Respondent to contact or deal with any employer concerning his horseplay complaint, which appears to be strictly an internal union matter. Neither the General Counsel nor the Charging Party has asserted that horseplay affected the way the Respondent dealt with employers at the bargaining table, in grievance proceedings, or the operation of its hiring hall.

Indeed, the General Counsel does not even claim that the Respondent had a duty to take *any* action at all concerning the horseplay complaint itself. During oral argument, counsel for the General Counsel stated, "the General Counsel is not alleging that Respondent should have done more; the allegation here is that [Business Agent] Pearlman failed to tell the Charging Party [Audette] that it had done anything."

Presumably, therefore, the Respondent could have notified Audette that it would take absolutely no action on his horseplay complaint and, under the Government's theory, that would have been perfectly lawful. Nonetheless, the General Counsel contends that the Respondent, by failing to inform Audette about the not-required "remedial efforts," somehow has failed to represent him fairly.

The General Counsel's argument assumes the existence of a free-floating duty to provide members with information, that is, the argument postulates a duty unrelated to the representation duty which the Act imposed on the Respondent when it became the employees' exclusive bargaining representative. In establishing that the Respondent is under a duty which falls within the Board's purview, the General Counsel must point to its source within the Act, but such a source is not obvious.

As noted above, complaint paragraph 8 raises allegations similar to those raised in complaint paragraph 7, namely, that the Respondent failed to inform Charging Party Audette about remedial efforts it had taken in response another complaint which Audette had submitted. More

specifically, about a month after Audette complained to the Respondent that a union official had engaged in horseplay, Audette complained to the Respondent that another union member had made a "terroristic threat" against him. Complaint paragraph 8(b) alleges that the Respondent failed to notify the Charging Party regarding its remedial efforts to resolve this complaint, and complaint paragraph 11(a), quoted above, alleges that the Respondent thereby violated Section 8(b)(1)(A).

Again, the General Counsel argues that the Respondent breached its duty of fair representation. However, the record doesn't establish that Audette contemplated that the union would contact an employer concerning the alleged "terroristic threat" and it also does not suggest that the Respondent would handle such a complaint by contacting an employer. The General Counsel bears the burden of establishing that the Act imposed on the Respondent a duty to inform its members about its "remedial efforts." That burden can be carried by proof that such "remedial efforts" play some part in, or have some relationship to, the Respondent's dealings with an employer on behalf of employees.

The record fails to establish that Audette sought for the Respondent to have any dealings with the employer as a means of addressing his complaints. Similarly, the record does not indicate that the Respondent contemplated any "remedial efforts" which would entail dealing with the employer. Therefore, rejecting the General Counsel's argument, I conclude that the facts alleged in complaint paragraphs 7 and 8, even if proven, would not establish a violation of Section 8(b)(1)(A) of the Act.

Complaint paragraph 10 alleges that about May 29, 2018, the Respondent failed to notify Audette of a procedure by which he could submit complaints regarding workplace conflicts with other employees. Complaint paragraph 11(c) alleges the following:

> By the conduct described in paragraph 10, Respondent has failed to notify Charging Party Audette about a complaint procedure for reasons that are arbitrary, discriminatory, or in bad faith and has breached the fiduciary duty it owes to said employee and the Unit and it has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(I)(A) of the Act.

To prove this allegation, the General Counsel must establish that the Respondent, because of its status as exclusive bargaining representative, owed a duty to "said employee and the Unit" to notify them about a complaint procedure. However, the "complaint procedure" did not concern either complaints to an employer or complaints about the way an employer treated employees. Rather, Audette was seeking a procedure by which one employee could complain about another employee.[9]

Such a complaint procedure would involve only internal union matters, such as proceedings before the Respondent's executive board as noted below, under a rule which is part

[9] The credited evidence indicates, and I conclude, that Audette contemplated that the Respondent itself would take action to resolve such a conflict with another employee. In other words, the evidence does not establish that Audette was asking the Respondent to file a grievance on his behalf with the employer.

of the Respondent's constitution and bylaws, a member can be fined for complaining to the employer about a fellow worker. The rule instructs a member with such a complaint to "follow the proper procedures and go before the Executive Board for satisfaction."

Nothing in the Respondent's constitution and bylaws, and no evidence in the present record, suggests that the executive board, after receiving one union member's complaint against another employee, would involve an employer in this internal dispute. Accordingly, I conclude that resolution of a complaint by one union member against another would not require the Respondent to deal with an employer and therefore would not involve the exercise of power conferred upon it by the Act.

The Act empowers and requires a union, in furtherance of its role as exclusive bargaining representative, to perform certain duties, and it also sometimes requires a union to inform employees about how it discharged those duties. Does the Act ever require the union to provide its members with information about matters unrelated to the duties which the Act has imposed? In answering that question, it may be helpful to examine instances in which the Board has held that a union had a duty to provide information to employees.

Often, when the Act does require an exclusive bargaining representative to provide employees with certain information, this information concerns the status of a grievance which the union had filed on behalf of an employee pursuant to the grievance procedure the union and the employer had negotiated. Obviously, the union's duty to provide the information arose as part of its statutory responsibilities to administer the contract and to represent employees. See, e.g., *Auto Workers Local 909 (General Motors Corp.)*, 325 NLRB 859 (1998) (union had duty to provide information about its distribution of a grievance settlement); *Food & Commercial Workers Local 1657 (Food World)*, 340 NLRB 329 (2003) (union unlawfully failed to provide employee with a copy of arbitrator's decision resolving his grievance).

In other cases, the Board has found that a union has a duty to furnish information about how it operates a hiring hall which it has established by agreement with an employer or group of employers. See *Electrical Workers Local 24 (Mona Electric)*, 356 NLRB 581 (2011) (unlawful for union to refuse to permit job applicant to copy information from referral list); *Operating Engineers Local 12 (Nevada Contractors Assn.)*, 344 NLRB 1066 (2005).

A duty to provide employees with information also may arise when a union and employer have entered into a collective-bargaining agreement containing a union-security clause typically requiring an employee, after an initial period, to become and remain a union member as a condition of continued employment.[10] In lieu of dues, an employee who does not wish to join the union may pay an "agency fee" consisting of that fraction of the union dues used by the union to represent the bargaining unit employees in dealings with the employer, and excluding other expenses not related to representation. A union has a duty to provide to a bargaining unit employee, on request, verified information relating to the union's determination of the agency fee amount. See *Communications*

[10] Sec. 14(b) of the Act allows states and territories to prohibit such clauses. See 29 U.S.C. § 164(b). The events in this case took place in Texas, a state which has enacted such a prohibition. The complaint in this case does not allege any violation pertaining to information about union dues or agency fees.

Workers v. Beck, 487 U.S. 735 (1988); *United Nurses & Allied Professionals (Kent Hospital)*, 367 NLRB No. 94 (2019); *Teamsters Local 75 (Schreiber Foods)*, 365 NLRB No. 48 (2017); see also *Food & Commercial Workers Local 4 (Safeway, Inc.)*, 365 NLRB No. 32 (2017). This information relates to an employee's obligations under the union security clause and thus concerns an agreement the union has reached in its capacity as exclusive bargaining representative.

These examples illustrate the relationship between a union's duty to provide information to employees and its duty to represent the employees in matters related to the union's function as the employees' exclusive bargaining representative. In contrast, the Government here asserts that the Respondent has a duty to provide an employee with information not related to its representation of employees in dealings with their employer. Clearly, the violations alleged in complaint paragraphs 7, 8, and 10 do not concern how the Respondent used, or failed to us, the authority conferred upon it by Section 9(a) of the Act.

The General Counsel does not contend, and the evidence does not establish, that the Respondent treated Audette disparately from the way it has treated other employees. No evidence suggests that the Respondent provided other employees with the type of information requested by Audette. Likewise, no evidence indicates that the Respondent sought to retaliate against Audette for any previous protected activities.

During closing argument, the Government offered a somewhat different theory of violation, contending that the Respondent had assumed a disciplinary function ordinarily performed by management, and that because of this increased authority, its duty of fair representation also increased. Specifically, the General Counsel cited the portions of the Respondent's constitution and bylaws[11] which prohibit a union member from complaining to an employer about another member and instead require the member to lodge the complaint with the Respondent's executive board:

> Counsel for the General Counsel argues that the Union, having taken it upon itself to be the sole champion[12] of the employees' complaints, was subject to a

[11] Art. VII of the Respondent's Constitution and Bylaws, "General Rules and Regulations," includes the following rules:

7. Any person found guilty of complaining to the employer as to the conduct or abilities of any fellow member shall be fined $25. Should it be determined that a member has lost his job due to the complaining remarks, the complaining person shall be fined $100.

8. If a person has a complaint or grievance about a member, Steward, client, assignment, etc.—follow the proper procedures and go before the Executive Board for satisfaction. If a person argues with a Job Steward he will be fined $50 for each offense. If the argument is held in front of the crew the fine will be $75 for each offense. If the argument is in front of the client the fine will be $200. Harassment on the job is not tolerated; file your grievance when the call is finished.

The Board has held that a union rule prohibiting one union member from complaining to management about another can unlawfully restrain or coerce members from exercising their Section 7 rights to complain concertedly to management about safety violations, including those committed by a fellow union member. See, e.g., *Teamsters Local 869 (Anheuser-Busch)*, 339 NLRB 769 (2003). However, in the present case, the Government does not allege that any provision in the Respondent's Constitution and By–Laws violates the Act.

[12] The General Counsel's use of the term "sole champion" perhaps suggests that the Respondent

heightened duty and that it breached its fiduciary duty to Audette by failing to inform him about its efforts to remedy his workplace complaints.

The General Counsel's argument assumes that the Respondent, on its own, can take on an additional duty not imposed by the Act, and then be held accountable for it in the forum which Congress created to enforce the Act. Doubtless, the Respondent might create some new duty for itself, for example, by borrowing money that it was duty bound to repay. However, the lender must seek relief in another forum rather than here. The Board possesses only the authority which Congress granted it to oversee the statutory scheme. Neither the Respondent nor the Board, nor any other entity except for Congress itself, can increase that authority.

Congress enacted the National Labor Relations Act to address and reduce the "strikes and other forms of industrial strife or unrest" which resulted from "denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining." 29 U.S.C. § 151. The Act established a system of collective bargaining and a procedure for employees to select a union to represent them in that process. It imposed duties on such exclusive bargaining representatives. Because Congress assigned the Board to walk this beat, policing the collective-bargaining process, the Board may examine how fairly an exclusive bargaining representative uses the authority which the Act conferred. But Congress did not deputize the Board to be an all-purpose Smokey Bear patrolling a union's habitat and stomping out any flicker of unfairness. Nor did it grant the Board an amoeba-like ability to morph or extend pseudopodia out to cover matters not a part of the statutory scheme. The Board must follow, not rewrite, the statute which created it.

In *Office Employees Local 251 (Sandia National Laboratories)*, above, the Board held that internal union discipline violates Section 8(b)(1)(A) only if the union's conduct: (1) affects the employment relationship, (2) impairs access to the Board's processes, (3) pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or (4) otherwise impairs policies imbedded in the Act.

Strictly for the purposes of legal analysis here, in considering whether the alleged breaches of the duty of fair representation fall within the Board's purview, I will temporarily disregard the credibility determinations discussed earlier in this decision and view the facts in the light most favorable to the General Counsel. Complaint paragraph 7(b) alleges that the Respondent failed to

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has taken on the role of defender or protector of the employees' rights or interests. Thus, the term implies a representative function. Such a characterization causes no dissonance with the General Counsel's argument that the Respondent had a duty of fair representation when performing this function and therefore a duty to provide information about it to union members.

However, the role which the Respondent assumed is more like that of a supervisor empowered to mete out discipline for misconduct in the workplace. An argument that the Respondent has a duty of fair representation when performing a disciplinary function presents somewhat of a conceptual hurdle.

The Respondent's unilateral assumption of authority to fine members for their actions in the workplace is not analogous to a union's assumption of some hiring duties when it operates an exclusive hiring hall. A union cannot, and does not, create such a referral arrangement unilaterally. Rather, the hiring hall results from an agreement between the union, acting on behalf of employees, and one or more employers. When a union operates such a hiring hall, it is acting as employees' representative in dealing with their employers and this function is subject to a duty of fair representation.

notify Charging Party Audette "regarding its remedial efforts to resolve the Charging Party's complaint" about unwanted horseplay by a union official. Because any action the Respondent took or might take to curtail horseplay by its officers does not affect the employment relationship, failing to provide information about such action also would not affect that relationship. This alleged failure to provide information also would not impair access to the Board's processes, would not constitute an unacceptable method of union coercion, and would not otherwise impair policies embedded in the Act. Therefore, I conclude that the conduct alleged in complaint paragraph 7, even if established by credible evidence, would not violate Section 8(b)(1)(A) of the Act.

Complaint paragraph 8(b) similarly alleges that the Respondent failed to notify Charging Party Audette regarding its remedial efforts to resolve Audette's complaint "regarding an employee's threat against him." Audette's complaint to the Respondent (that another employee had made a "terroristic threat") was not a demand that the Respondent convey Audette's complaint to an employer. Rather, Audette sought relief through the Union's own processes. Audette's complaint was consistent with the Respondent's policy, as manifested in its constitution and bylaws, which sought to keep employers "out of the loop" and instead resolve conflicts between union members internally.

Although this internal union process arguably might have resulted in the Respondent fining one of its members, it would not affect the employment relationship. It also would not impair access to Board processes, constitute an unacceptable method of union coercion, and would not otherwise impair policies embedded in the Act. Therefore, I conclude that the conduct alleged in complaint paragraph 8, even if established by credible evidence, would not violate Section 8(b)(1)(A) of the Act.

Complaint paragraph 10 similarly alleges that the Respondent failed to provide information about a particular task, resolving one member's "workplace conflicts with other employees," which does not affect the employment relationship. The alleged failure to provide such information also would not impair access to Board processes, constitute an unacceptable method of union coercion, and would not otherwise impair policies embedded in the Act. Therefore, I conclude that the conduct alleged in complaint paragraph 10, even if established by credible evidence, would not violate Section 8(b)(1)(A) of the Act.

In sum, the General Counsel has alleged that the Respondent breached its duty of fair representation by the conduct alleged in complaint paragraphs 7, 8 and 10. However, in each of these instances, I conclude that the Act did not impose a duty of fair representation on the Respondent because the alleged conduct was unrelated to the Respondent's functions as the exclusive bargaining representative. Therefore, were I to reach the merits, I would recommend that the Board dismiss these allegations.

Facts

Although I have recommended dismissal of this case on jurisdictional grounds, I make the following findings in case the Board disagrees with that recommendation.

Complaint Paragraph 7

Complaint paragraph 7(a) alleges that about February 18, 2018, Charging Party Audette submitted a written complaint to Respondent regarding unwanted horseplay by another union official. Complaint paragraph 7(b) alleges that the Respondent failed to notify the Charging Party regarding its remedial efforts to resolve the Charging Party's complaint.

The record reflects that Audette actually filed with the Respondent a complaint dated March 19, 2018, concerning Shombrae Winston, a member of the Respondent's executive board. The complaint stated:

> On 3/18/18, Shombrae Winston attempted for the 10th time to trip me with his foot. This has been a long term issue with him, and in addition to trying to trip me, he has at other times snuck up on me from behind and jumped on my back in a manner causing me distress and possible back injuries. He has also told his superiors that I have used the bathroom for 30 minutes at a time when I did not, causing my supervisor up there to complain to me about it.
>
> No one should be physically and verbally assaulted on a daily basis at their job sight, and I will be consulting the proper Government and legal authorities if my concerns have not been addressed by Local 127 and the Dallas Opera. . .and the fact that Shombrae Winston is a officer of Local 127 brings into play other subjects such as official oppression.

Both Winston and Audette testified. Based on my observations of the witnesses, I believe that Winston's testimony is reliable and credit it. For reasons discussed above, I do not have such confidence in Audette's testimony, and do not credit it where it conflicts with Winston's account.

Winston and Audette had a practice of playing practical jokes on each other. On one occasion at work, Audette poured juice from a can of tuna into Winston's shoe. Winston testified that he never actually jumped on Audette's back or tripped him, but would kick at Audette's feet: "If he was in front of me, then I would just kick at his feet just to make him think, like, Oh, just to let him know that I was trailing behind him or whatever. I never intended to hurt him in any kind of form."

Although Audette's written complaint accused Winston of telling "his superiors" that he was in the bathroom for 30 minutes, based on Winston's credited testimony, I find that Winston did not. Rather, the head electrician and the shop steward were looking for Audette. Winston called Audette on his cell phone to let him know that he was needed, and then Audette himself admitted being in the bathroom.

The Respondent's business agent, Gregg Pearlman, credibly testified that after receiving Audette's complaint, he contacted Winston and told him to "refrain from any fun play of any kind that might be taken a different way." Pearlman did not contact Audette to inform him that he had spoken with Winston. However, Audette admitted that he did not contact the business agent to ask about the matter:

> Q. Okay, did you hear back from Mr. Pearlman regarding your complaint?
> A. The incident involving Winston, I did not hear back from him.
>
> Q. So did you follow up with Mr. Pearlman after you submitted the written complaint directly to him?
> A. Not to my knowledge, I didn't.

The General Counsel contends that the Union had a duty to contact Charging Party Audette and advise him of the action which Business Agent Pearlman had taken. For reasons discussed above, I conclude that the business agent was not performing a representation function when he told Winston to stop the horseplay and, therefore, the Act does not impose a duty of fair representation. However, even were I to assume that such a duty applied in this case, the Respondent did not breach it and did not violate the Act.

In discharging their duties as exclusive bargaining representatives enjoy a wide range of reasonableness. *Ford Motor Co. v. Huffman*, above; *Auto Workers Local 651 (General Motors Corp.)*, above; *Rochester Regional Joint Board Local 451, Workers United (Sodexo, Inc.)*, 359 NLRB 1538, 1541 (2013) *Food & Commercial Workers Local 540 (Tyson Foods)*, 366 NLRB No. 105 (2018). But even if the range of reasonableness were considerably narrower, Business Agent Pearlman's actions fell well within it. Audette's complaint did not specifically ask the Respondent to inform him of any action it took. Moreover, the matter was so minor that even Audette did not make an effort to call the Respondent to inquire about it.

Even assuming for the sake of analysis that a duty of fair representation applied in this instance, the Respondent acted well within it.

Complaint Paragraph 8

Complaint paragraph 8(a) alleges that about March 20, 2018, Charging Party Audette submitted a written complaint to Respondent regarding an employee's threat against him. Complaint paragraph 8(b) alleges that Respondent failed to notify the Charging Party regarding its remedial efforts to resolve this complaint.

The details of this supposed threat already have been discussed above in connection with Audette's credibility as a witness. They do not require a lengthy retelling here because the alleged violation does not concern the purported threat itself but rather the Respondent's alleged failure to inform Audette about what "remedial efforts" it had taken to resolve his complaint about the threat.

According to Audette, the "threat" took place while he was working on the stage at the Winspear Opera House in Dallas. Audette testified:

> I saw who I now know as Chaz Phillips come into the Hall. I believe he had been upstairs reading or something. Anyway I kind of waved at him because he look kind of familiar. I thought he was one of my Facebook friends, who I thought his name was Seth. But there is another Seth that is not him. So, I mistakenly thought

> his name was Seth. Subsequently I learned that his first name was Chaz, and I had been on some other Facebook page, and I saw a picture of him where he was referred to as Chaz Freeman. I subsequently learned that his name is Charles Chaz Phillips. Yes. And, yeah, he started -- he said in an audible voice that could be heard, like a 40-foot circle around him, said, something to the effect that he thought he should whip my a-s-s, yeah, that kind of terminology, and then he started talking to the roadie about me going and taking a picture of Kerry Steele at the hospital, and yes.

A "roadie" is a stagehand who travels with the troupe of performers from venue to venue. Audette did not identify this particular "roadie" by name but described her as a woman who wore a nose ring. She did not testify. Later that same day, Audette sent a text message to Business Agent Pearlman. It stated:

> Just to let you know, Seth made a terroristic threat to me at the Winspear today in front of numerous witnesses including the client (a misdemeanor crime). He then proceeded to tell the client about my visit with my visit with Kerry @ Baylor. She was the short roadie girl with the nose ring. As the chief investi[gator] of our Union I am sure that you will have no problem verifying this claim with the client
>
> Or maybe his name is Chris, think he used to work at the Myerson

As discussed above in the credibility analysis, later that same day, Audette sent Pearlman another text message which identified the person who made the alleged threat as "Chas Freeman." Audette transmitted that text at 7:33 p.m. on March 20, 2018.

Audette's thoughts may have continued to dwell on this incident to the point it interfered with his sleep. At 2:43 a.m. he sent Pearlman still another text, which stated:

> I will consider 24 hours without a response on this issue to be acceptance of me notifying [sic] the proper legal authorities of this issue

It appears that the more Audette thought about it, the more upset he became. At 3:22 a.m. he sent Pearlman another text, which stated:

> possibly criminal charges to be filed against Local 127 beginning tomorrow after 11 am

Audette's text does not explain how the Respondent could incur even civil liability, let alone criminal, because another stagehand had told Audette "something to the effect that he thought he should whip my a-s-s." Yet Audette did not let the matter die. He went to the Respondent's offices to speak with Pearlman, who was then on the telephone. Rather than wait for Pearlman to conclude the call, Audette called the police who came to the Respondent's offices. Audette gave the officer his version of what had happened at the Winspear Opera House. Then, Audette left without ever talking with Pearlman.

The business agent did inquire into the matter, first contacting the job steward, who told Pearlman he did not know about the incident. Pearlman was able to identify the stagehand whom Audette had accused of making a threat. The man's name was Charles Phillips, not Chaz Freeman, as Audette had reported.

Business Agent Pearlman asked the Respondent's secretary-treasurer, Allen Bell, to speak with Phillips because both Bell and Phillips were working at the same location. Neither Bell nor Phillips testified but, according to Pearlman, Phillips had no recollection of the incident Audette had described.

The Respondent's executive board discussed the matter at its April 2, 2018 meeting. The minutes of that meeting include the following entry:

> Martin Audette. -20-2018 Texted an officer that "Seth" made a terroristic threat @theWinspear, then said it was Chris Freeman. It was Chas Phillips that told him the picture taking and posting of Kerry Steele was shit. Martin didn't tell the steward but did come to the office and said he'd call the police, and he did. They arrived and talked to him. Haven't heard anything from them. Unanimous E-Board vote to inform Martin that he reports infractions to the Job Steward.

Pearlman did speak with Audette about the action of the Respondent's executive board. Although Pearlman did not recall the date, he credibly testified that he had a conversation with Audette while they both were at the Winspear Opera House:

> Q. Okay. And what did you say to him?
> A. I told him that if he would just report these things immediately and to the job steward, we could get everything worked out right then and there. That that's the process, that's the procedure that I would appreciate him using.
>
> Q. What did he say?
> A. He didn't say anything to it.

Audette denied having this conversation with Pearlman[13] but, for the reasons discussed above, I do not believe Audette's testimony was reliable and do not credit it. Rather, based on my observations of the witnesses, I credit Pearlman's testimony. Therefore, I conclude that the Respondent did inform Audette of the action it had taken with respect to Audette's complaint.

It may well be that Audette did not like what the executive board had decided. However, the complaint does not allege that the Respondent violated the Act by taking some improper action

[13] Specifically, Audette gave the following testimony:

Q. Did Mr. Pearlman ever approach you while you were at one of your jobs and talk to you about making complaints to the Job Steward?

A. No.

Q. At no point in time did that ever happen?

A. No.

with respect to Audette's complaint and it appears unlikely that the Board even would have jurisdiction to review this internal union matter.

Rather, the complaint alleges that "Respondent failed to notify the Charging Party regarding its remedial efforts to resolve the Charging Party's complaint." However, the credited evidence establishes the opposite, that Business Agent Pearlman did convey to Audette what the Respondent's executive board had decided.

Although I am recommending that the Board dismiss the complaint because the evidence does not satisfy the Board's discretionary standards for exercise of its jurisdiction, were I to reach the merits, I would recommend dismissal of this allegation because unsupported by credible evidence.

Complaint Paragraph 9

Complaint paragraph 9 alleges that about May 7, 2018, the Respondent, by the Respondent's president, Johnny Macho, "told an employee that he would be responsible for the Union's legal fees if the Charging Party lost his NLRB case." The Respondent denies this allegation.

According to Charging Party Audette, he spoke with Macho on May 7, 2018, while they were in the loading dock area of the Winspear Opera House. According to Audette, another stagehand, Carl Labry, also was present. Audette testified as follows:

> Q. And what did Mr. Macho say to you, as best as you can recall?
> A. Okay, the first thing he said to me is, Well, Marty, you've exhausted all of your options. I am not sure if he said the word legal. ...exhausted all of your actions regarding these complaints that I had made, I guess, about Shombrae. That was the first thing he said. And then the second thing he said was, You do understand that if your case is found to be groundless, that you will be -- you will be responsible for paying the lawyer fees from the Union Hall. And after he said that, Carl Labry said something in agreement to that statement.
>
> Q. What was that?
> A. Yeah, Johnny -- Yeah, Macho's right, something to that effect. I don't exactly recall the exact wording of it.

Macho denied making the statement which Audette attributed to him. He testified that on one occasion, he remarked the lawyers were expensive. He made this comment in the context of a discussion about the unfair labor practice charge which Audette had filed. However, according to Macho, he was working at another location, not the Winspear Opera House, when he made the remark, which did not suggest that Audette would have to pay the Respondent's legal fees if he lost.

Stagehand Labry also testified but did not recall hearing Macho make any statement about Audette having to pay the Respondent's legal fees if he lost. Based upon my observations of both Labry and Macho when they testified, I conclude that both of these witnesses gave reliable testimony, which I credit. For reasons discussed above, I do not credit Audette's testimony.[14]

Based on the credited testimony, I find that Macho did not make the statement attributed to him by complaint paragraph 9. If I were to reach the merits, I would recommend that the Board dismiss this allegation.

Complaint Paragraph 10

Complaint paragraph 10 alleges that about May 29, 2018, Respondent failed to notify the Charging Party of a procedure by which he could submit complaints regarding workplace conflicts with other employees. The Respondent denies this allegation.

Audette claims that while he was working on May 29, 2018 at the AT&T Performing Arts Center, another stagehand, John Shelton, either bumped into him or "shoulder punched" him, causing Audette serious pain. Shelton's testimony, which I credit, establishes that he and Audette passed each other in a crowded hallway and bumped accidentally.

The next day, Audette filed reported the matter to building security, stating that the impact had caused his back to snap and that he was in pain. That same day, when Job Steward Anthony Woodard[15] came to work, he learned that Audette had reported the matter to building security, so he went to Audette to discuss it. Woodard testified that he asked Audette what had happened:

> Q. What did you ask him?
> A. I asked him what happened.
>
> Q. And what did he tell you?
> A. He said that Shelton pushed him or hit him in the back.
>
> Q. Did you—what did you say afterwards?
> A. I said, "Are you okay?" I said, "Do you need to file out a complaint." I said, "If so, better go to George's office right there and let's go file out a complaint." And he said, "No, that's okay. I'm going to work." Then I asked him, I said, "Well, do you want to file a complaint on Shelton?" There's two complaints. If you get

[14] After the Respondent received a copy of the unfair labor practice charge which Audette had filed against it, Business Agent Pearlman sent Audette an email dated May 15, 2018. Referring to the allegation in the charge that the Respondent had threatened Audette by informing him that he would be responsible for its legal fee should Audette lose the case, Pearlman assured Audette that the Respondent would not seek in any way to hold him responsible for its legal fee if he lost the case.

That same day, Audette replied with an email stating his willingness to take a lie detector test. In view of my finding that Macho did not make the statement attributed to him, this exchange of emails is not relevant to the disposition of the allegation.

[15] The complaint alleges, and the Respondent has admitted, that Job Steward Woodard is its agent.

> hurt, you file out one with the client. The client is Texas Ballet. He's—they have the medical. Another complaint come from the Local where you file—where you fill out a sheet and it gets turned in. He didn't want to do it.

From context, I conclude that when Woodard said "the medical," he was referring to the medical treatment available for work-related injuries. However, Audette did not seek such workers compensation benefits. Woodard further testified that he had the form used when one stagehand files a complaint with the Respondent against another stagehand:

> Q. Okay. Thank you. And so, when you approached him, you said complaint form.
> A. I asked him did he want to file a complaint against John Shelton, and he said, "No."

Based on my observations of the witnesses, and for the reasons discussed above, I conclude that Woodard was a more reliable witness than Audette. Crediting Woodard's testimony, I find that he did offer Audette the opportunity to file an internal union complaint against Shelton.

When Shelton came to work, Woodard told him about Audette's complaint. Shelton testified he went to talk with Audette:

> Q. Did [Job Steward Woodard] get you two together at some point?
> A. No. I mean, he didn't get us together. We were working in the same department, and I went over there and talked to Martin [Audette] and said, Hey, if I poked you or you felt like you were injured or something, then I'm sorry. I didn't mean to hurt you or hit you that hard. If we hit each other, I didn't think it was that kind of deal.
>
> Q. Were you hurt?
> A. No.
>
> Q. What did he say after you said that you were sorry if you had hurt him?
> A. If I remember, he said, Its okay. I'm all right. You know...

Shelton testified that he is 5 feet 8 inches tall and weighs 145 pounds. Audette testified that he is 5 feet and 11 inches tall and weighs about 175 pounds. Thus, Audette is 3 inches taller than Shelton and outweighs him by 30 pounds. It is conceivable that, when the two men bumped, the larger might have suffered injury notwithstanding his additional heft, but that outcome does not seem particularly likely.

The fact that Audette did not file a workers' compensation claim or seek treatment for the injury which he complained he had suffered suggests that he exaggerated his complaint of pain. It

is one more example of Audette's tendency to over-dramatize, and further supports the conclusion that his testimony is not reliable.

In sum, the credited evidence directly contradicts the allegation, in complaint paragraph 10, that the Respondent failed to notify the Charging Party of a procedure by which he could submit complaints regarding workplace conflicts with other employees. The day after the accident, when Job Steward Woodard learned about it, he approached Woodard and asked if he wanted to file two different kinds of complaint. One would have been with the employer, so that Audette could seek workers compensation benefits. The other would have been an internal union complaint against Shelton. Audette decline to file either.

Additionally, Woodard had the form used when one stagehand wished to file an internal union complaint against another stagehand. When Woodard, in his capacity as job steward, asked Audette if he wished to file a complaint against Shelton, that action went beyond merely notifying Audette about the procedure to be used to file a complaint against another union member. It reasonably would be understood as an offer to assist him in doing so.

At that time, in May 2018, Audette had been a union member more than 15 years. If he had been unfamiliar with the procedure for filing such an internal union complaint, he would have asked about that procedure when the job steward asked if he wanted to file the complaint.

Moreover, less than 2 months earlier, the Respondent's executive board had decided that Audette should be told to use the internal union procedure when he wished to complain about another stagehand's conduct. The executive board made this decision because Audette, instead of filing an internal complaint about another stagehand, Charles Phillips, had filed a complaint with the police. In early April 2018, shortly after the Respondent's executive board decided that Audette should be instructed to use the internal union procedure, Business Agent Pearlman had conveyed this instruction directly to Audette. Thus, the Respondent both instructed Audette to use the internal union procedure and, through the job steward, offered him the opportunity to do so.

It may be noted that the Respondent had no reason to conceal from Audette the procedure for filing an internal union complaint against another stagehand but rather had powerful reasons to make sure he understood that he could do so. For one thing, the culture and ethos of the union militated in favor of handling disputes between members "in the family." As in many unions, the members referred to each other as "brothers," but this form of address does not appear, in this case, to be merely perfunctory.

Rather, the Respondent's constitution and by-laws reflect an intent to establish a kind of kinship among members which obligates them to look out for each other and to resolve their differences through private processes. Thus, the document begins with a pledge which each member signs. This pledge concludes with a promise "first to seek my remedies within this Local and the Alliance, before resorting to any other tribunals."

The Respondent's constitution and bylaws also include a list of objectives, among them, "protecting the rights and properties of all members of this Local, and doing all things necessary or proper to advance and promote their best interests." Resolving minor disputes between

members through an internal union procedure rather than allowing such matters to snowball into public conflicts with more serious consequences advances this goal.

The Respondent's rule, discussed above, prohibiting a member from "complaining to the employer as to the conduct or abilities of any fellow member," likewise manifests a policy of handling disputes between members internally. So does the rule requiring a member who has a complaint about another member or steward to "follow the proper procedures and go before the Executive Board for satisfaction."

Thus, the Respondent has a strong policy, embedded in its culture, memorialized in its constitution and bylaws, and enforceable by imposing fines, that members keep their complaints about other members within the family, as it were, and use the "proper procedures" to bring such disputes before the Respondent's executive board for resolution. This strong policy provides a powerful motivation for the Respondent to assure that its members, including Audette, know about the procedure to be used. Moreover, the record does not suggest any reason why, in the present case, the Respondent would wish to hide this procedure from Audette. To the contrary, the Respondent's executive board told him to use it.

Credible evidence establishes that Job Steward Woodard asked Audette if he wished to file a complaint against Shelton and stood ready to help Audette do so. Therefore, the Government has not proven that Respondent failed to notify Audette of the procedure to be used in filing such a complaint. Accordingly, were I to reach the merits, I would recommend that the Board dismiss the allegations raised by complaint paragraph 10.

Summary

To establish that the Board possesses jurisdiction in this case, the General Counsel must establish that the Respondent represents employees of an employer engaged in commerce within the meaning of the Act. To that end, complaint paragraph 3 refers to one entity which employs stagehands represented by the Respondent. That entity is the Texas Ballet Theatre. Complaint paragraph 3(a) alleges that it is a corporation with an office and place of business in Dallas, Texas, and has been engaged producing in ballet performances. Based on the admission in Respondent's answer, I so find.

This admission, however, does not extend to other facts necessary to establish that the Texas Ballet Theatre meets the Board's standards for the assertion of jurisdiction and that it is an employer engaged in commerce within the meaning of the Act. Complaint paragraphs 3(b) and 3(c) allege facts which, if proven, would establish that the Texas Ballet Theatre meets the Board's jurisdiction standards. However, the Respondent has denied these allegations and the Government has not presented evidence sufficient to carry its burden of proving them.

Complaint paragraph 3(d) alleges the conclusion that the Texas Ballet Theatre is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent has denied this allegation. In the absence of sufficient evidence to support this conclusion, I recommend that the Board dismiss the complaint because jurisdiction has not been established.

Should the Board conclude to the contrary, I believe that there are other reasons requiring the dismissal of the complaint. The General Counsel contends that, by the conduct alleged in complaint paragraphs 7, 8, and 10, the Respondent breached its duty of fair representation. However, I conclude that no duty of fair representation existed because the alleged conduct did not pertain to the Respondent'' exercise of its statutory authority as the employees' exclusive bargaining representative. For that reason, I would recommend that these allegations be dismissed.

Additionally, I conclude that credible evidence does not establish that the Respondent engaged in any of the conduct which the complaint alleges to violate the Act. The General Counsel relies upon Charging Party Audette's testimony to prove these allegations but, for a number of reasons discussed above, he was not a credible witness.

For all of these reasons, I do not conclude that the General Counsel was substantially justified in proceeding on any of the alleged violations of Section 8(b)(1)(A). Based both on jurisdictional grounds and, alternatively, on the merits, I recommend that the Board dismiss the complaint in its entirety.

Conclusions of Law

1. The Respondent, International Alliance of Theatrical Stage Employees (IATSE), Local 127, is a labor organization within the meaning of Section 2(5) of the Act.

2. The record does not establish that the Respondent is the exclusive bargaining representative of employees of an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

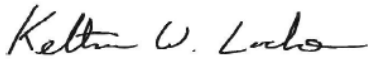
3. The Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended

ORDER[16]

The complaint is dismissed.

Dated Washington, D.C. June 18, 2019



Keltner W. Locke
Administrative Law Judge

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.